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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-357.

LINMARK ASSOCIATES, INC. and WILLIAM MELLMAN,
Petitioners,

v.

THE TOWNSHIP OF WILLINGBORO and GERALD DALY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONERS.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. The Willingboro Ordinance Banning "For Sale" Signs Violates Petitioners' Right of Free Speech Under the First and Fourteenth Amendments	12
A. Commercial Advertising Is Protected by the First and Fourteenth Amendments	12
B. A Ban on Advertising Cannot Be Justified if the Goal Sought to Be Accomplished Depends Upon Public Ignorance	14
C. The Justification Offered by the Township Does Not Warrant the Invasion of Free Speech Occasioned by the "For Sale" Sign Ban	17
1. The Township Has Not Demonstrated That an "Evil" Exists	19
2. The "For Sale" Sign Ban Has Not Been Demonstrated to Be Necessary to Avoid "Fear Psychology" and Irrational Reaction	22
3. There Has Been No Demonstration That the "For Sale" Sign Ban Will Prevent "Fear Psychology" and Irrational Reaction	24
4. The Decision in Nebraska Press Association v. Stuart Supports Reaching the Same Result Here	24

INDEX (Continued).

	Page
D. The Sign Ban Cannot Be Justified as a Mere Restriction Upon the Time, Place, or Manner of Communication	26
E. The "For Sale" Sign Ban Cannot Be Justified as a Mere Incidental Restriction of Free Speech	29
II. The Ordinance Banning "For Sale" Signs Violates the Fourteenth Amendment's Equal Protection Clause	33
CONCLUSION	37

CITATIONS.

Cases:	Page
Bigelow v. Virginia, 421 U. S. 809 (1975)	14, 19
Buckley v. Valeo, 424 U. S. 1 (1976)	26, 30
Cohen v. California, 403 U. S. 15 (1971)	19, 31
Cox v. Louisiana, 379 U. S. 536 (1965)	29
Cox Broadcasting Corporation v. Cohn, 420 U. S. 469 (1975)	28
Dennis v. United States, 183 F. 2d 201 (2d Cir. 1950) aff'd, 341 U. S. 494 (1951)	18
Elrod v. Burns, – U. S. –, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)	18, 30
Erznoznik v. City of Jacksonville, 422 U. S. 205 (1975)	22
Gilmore v. City of Montgomery, 417 U. S. 556 (1974)	35
Gomillian v. Lightfoot, 364 U. S. 339 (1960)	35
Grayned v. City of Rockford, 408 U. S. 104 (1972)	28, 29
Griffin v. County School Board of Prince Edward County, 377 U. S. 218 (1964)	35
Kovacs v. Cooper, 336 U. S. 77 (1949)	29
Levitt and Sons, Inc. v. Division Against Discrimination in State Department of Education, 31 N. J. 514, 154 A. 2d 177, appeal dismissed, 363 U. S. 418 (1960)	4
Malloy v. Hogan, 378 U. S. 1 (1964)	12
Near v. Minnesota, 283 U. S. 697 (1931)	17, 18
Nebraska Press Association v. Stuart, – U. S. – , 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976)	18, 24, 26
Pell v. Procunier, 417 U. S. 817 (1974)	29
Pittsburgh Press Company v. Human Relations Commission, 413 U. S. 376 (1973)	18, 19
Reitman v. Mulkey, 387 U. S. 369 (1967)	35
Thornhill v. Alabama, 310 U. S. 88 (1940)	12
Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969)	22
United States v. O'Brien, 391 U. S. 367 (1968)	29, 30
Valentine v. Chrestensen, 316 U. S. 52 (1942)	12

CITATIONS (Continued).

Cases (Continued): Page

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., – U. S. –, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) 12, 13, 16, 23, 26, 30
Young v. American Mini Theatres, Inc., – U. S. –, 49 L. Ed. 2d 310, 96 S. Ct. – (1976) 19, 29, 31, 32

Constitution and Ordinances:

Amendment I 2, 9, 12, 21, 24
Amendment XIV, Section 1 .....2, 9, 11, 12, 21, 33
Revised General Ordinances of the Township of Willingboro, New Jersey, Chapter XVII:
Section 17-2 ..... 2, 3
Section 17-6.5 ..... 3, 4
Ordinance No. 5-1974 4

Statutes:

Federal Election Campaign Act of 1971, Amended 1974 30
28 U. S. C. § 1254(1) 1
28 U. S. C. § 2101(c) 1

Miscellaneous:

Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1497 (1975) 30
The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1 (1976) ..13, 19

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BRIEF FOR THE PETITIONERS.

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 535 F. 2d 786. The opinion of the District Court is unreported and is Appendix B to the Petition for Certiorari.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 28, 1976. A timely petition for rehearing was denied by that court on June 11, 1976. A Petition for Writ of Certiorari was filed on September 8, 1976, less than ninety days after rehearing was denied by the Court of Appeals. *See* 28 U. S. C. § 2101(c). This Court granted the Petition for Writ of Certiorari on November 8, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED.

Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised General Ordinances of the Township of Willingboro, New Jersey, Chapter XVII, § 17-2:

> ". . . it shall be unlawful to erect or maintain any sign at any place within the said Township of Willingboro when the same does not comply with the provisions of this chapter."

Prior to its repeal on March 18, 1974, Section 17-6.5 of the Ordinances allowed, subject to certain conditions, the use of signs relating to the "lease, rental, or sale" of residential premises. On March 18, 1974, Section 17-6.5 was repealed by Ordinance No. 5-1974, thus making it unlawful to use such signs.

The full text of Chapter XVII, Revised General Ordinances, is set forth in the Appendix (A 10-22).

QUESTION PRESENTED.

Does a municipal ordinance which bans the use of "For Sale" signs on residential premises deny prospective sellers and buyers the freedom of speech, equal protection of the laws, and due process guaranteed by the First and Fourteenth Amendments?

STATEMENT OF THE CASE.

A. The Willingboro Sign Ordinance.

In Chapter XVII of its Revised General Ordinances, the Township of Willingboro, New Jersey, has adopted a comprehensive regulatory scheme governing the erection and maintenance of signs. Section 17-2 of the Revised General Ordinances provides:

> Signs may be erected and maintained in the Township of Willingboro only when the same comply with the provisions of this chapter, and it shall be unlawful to erect or maintain any sign at any place within the said Township of Willingboro when the same does not comply with the provisions of this chapter (A 11).

Thus the Revised General Ordinances prohibit the use of any sign which is not specifically allowed by the Ordinances.

Prior to March 18, 1974, the Ordinances contained Section 17-6.5, which allowed the use of:

> 17-6.5 *Rental Signs.* Signs pertaining to the lease, rental or sale of the premises on which they appear, subject to the following conditions:
>
> a. The size of the signs shall not exceed eight square feet in area.
>
> b. The sign shall be located upon the premises to which it pertains and shall not project beyond the property line of such premises.
>
> c. Such signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale for the premises in question by the occupant of the premises and/or the owner of the sign.

d. Not more than two such signs are to be placed upon any property. (A 14-15).

On March 18, 1974, the Township Counsel adopted Ordinance No. 5-1974, which repealed Section 17-6.5 of the Revised General Ordinances (A 23). As the result of such repeal, signs relating to the lease, rental or sale of homes in Willingboro were banned from that community (Complaint para. 9 at A 3 and Answer para. 3 at A 6).

B. This Action.

On July 24, 1974, plaintiffs filed their complaint demanding that Ordinance No. 5-1974 be declared unconstitutional and that its enforcement be enjoined (A 5). After a trial, the District Court held the ordinance unconstitutional. On appeal, the Court of Appeals for the Third Circuit, by a 2-1 decision, upheld the ordinance.

C. The Evidence.

The Township of Willingboro is located in Burlington County, New Jersey. Development of the Township began in the late 1950's when Levitt and Sons, Inc., began building moderately-priced homes for middle-income families. Early during the development, the Levitt organization refused to sell homes to non-white persons. In 1960 that practice was enjoined by the New Jersey Supreme Court. *Levitt and Sons, Inc. v. Division Against Discrimination in State Department of Education,* 31 N. J. 514, 154 A. 2d 177, *appeal dismissed,* 363 U. S. 418 (1960).

The non-white population of Willingboro increased from less than 1% in 1960 to 11.7% in 1970 and to 18.2% in 1973 (U. S. C. A. Joint Appendix 128a). The population of Willingboro had historically been transient because of the proximity of military installations and the nature of

employment in the area. Because of these factors, there arose within the community a concern that the community was unstable and that a large influx of non-white homeowners was undesirable. This concern was perhaps stated most articulately by Township Council member and former Mayor William J. Kearns, Jr., who testified on direct examination:

> . . . [P]eople in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.
>
> . . . .
>
> I don't think anyone was concerned with people of minority groups moving into the community or reaching a 20 percent, or even somewhere in the range of 20 to 25 percent minority grouping. They felt this was properly a generally average throughout the Delaware Valley area.
>
> But they did feel that if we had a situation where white home owners in the community were moving, not because they were transferred or not to move to a larger home or a smaller home, for other economic reasons, but were moving because what they sensed was the reaction of the community, but that we would wind up with Willingboro hitting beyond the point of minority group population that would turn it into an isolated pocket of minority groups in Burlington County. It would no longer reflect an integrated community, but would become a ghetto. [U. S. C. A. Joint Appendix at 179a-182a].

From other witnesses for the Township came the following testimony: After the ban on signs, one realtor was "still representing a straight about 80/20 minority to white seller buyer, both sides just maintaining a perfect balance and we're actually very happy." (U. S. C. A. Jt. App. 160a). That realtor did not consider that "we've had a panic in Willingboro." (U. S. C. A. Jt. App. 163a). He was familiar with a town that prohibited signs and acknowledged that it had "not one" black family (U. S. C. A. Jt. App. 165a). He believed that the 80/20 ratio represented "stability" in the community (U. S. C. A. Jt. App. 170a). Willingboro has experienced no "mass movement of whites out of town replaced by blacks." (U. S. C. A. Jt. App. 171a). The former mayor, who was a council member, did not indicate any "excess of turnover of property in any way whatsoever." (U. S. C. A. Jt. App. 198a). "The number of turnovers was not out of line with national averages. . . ." (U. S. C. A. Jt. App. 201a). A council member testified, with regard to the sign ban, that "the primary reason was stability." (U. S. C. A. Jt. App. 210a). He admitted, however, that there was no "unstable position." (U. S. C. A. Jt. App. 213a). The prices of homes range from "the low middle twenties" to the "low fifties." (U. S. C. A. Jt. App. 215a). There was no racial crisis at the time the ordinance was considered (U. S. C. A. Jt. App. 237a).

D. The Trial Court's Findings of Fact.

In holding that the ordinance was unconstitutional, the District Court found:

> [I]t appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. However, the key distinction between Willingboro and Gary, Indiana is that in Gary the stimulus and response were easily observable. As "For Sale" signs appeared, whites disappeared from the city *en masse*. Yet in Willingboro, there exists no evidence of similar patterns. Rather, there is merely an indication that its residents are concerned that there may be a large influx of minority groups moving into the town with the resultant effect being a reduction in property values. . . .
>
> • • •
>
> "In light of testimony . . . that approximately thirty percent of inquiries . . . are a result of 'For Sale' signs being posted on residences, it is apparent that the ordinance brings about a serious denial of a property owner's right to freely and reasonably express to others the desire to sell in violation of the First Amendment."

The District Court found further that a prospective buyer has only a limited "option" in choosing a home from those shown to him by a realtor and "[t]his fact along with the purported purpose of the ordinance—'stabilization of neighborhoods'—may have the ultimate effect of freezing

in past discrimination, denying blacks a fair opportunity to find suitable housing."

The District Court also found "abundant evidence of potential interference with the right to travel," and that a potential buyer must seek out a realtor "no longer being able to merely assess a particular residential area in a community to ascertain for himself the homes which are available."

E. The Decision of the Court of Appeals.

The Court of Appeals for the Third Circuit reversed the decision of the District Court. Circuit Judge Gibbons filed an opinion dissenting from the reversal.

SUMMARY OF ARGUMENT.

The ordinance in question prevents each homeowner in Willingboro from communicating by a sign on his premises the fact that his home is for sale. It likewise prevents the public from receiving such information from "For Sale" signs. As communication protected by the First and Fourteenth Amendments, the message of a "For Sale" sign cannot be banned merely to avoid an assumed irrational reaction on the part of homeowners. Furthermore, the means adopted by the Township to effect its purpose violates the Equal Protection Clause of the Fourteenth Amendment since the purpose and effect of the ordinance is to "stabilize" the Township's racial balance which, stated otherwise, means the exclusion of racial minorities from the Township.

I.

Commercial advertising, including the use of "For Sale" signs, is protected communication under the First Amendment. Open channels of communication regarding lawful commercial activities are essential under the American free enterprise system. The purpose of the Willingboro sign ban is to prevent "fear psychology" which "might result in Willingboro metamorphosing from an integrated community to a ghetto." To prevent "fear psychology" the Township has sought to suppress public knowledge that homes are for sale. The goal of the sign ban thus depends upon public ignorance and hence the ban is unlawful.

II.

The Township's ban on "For Sale" signs is "presumptively unconstitutional." The Township has not sustained

its burden to show the existence of an interest sufficiently vital to justify its ban on this form of communication. Justification is not sought on the grounds of aesthetics or to prevent false, deceptive, or illegal advertising or activities. Property values have not declined. The turnover of homes in Willingboro has not been out of line with national averages. The Township's proffered justification—to prevent a change in the racial balance of the Township—is too amorphous an apprehension to warrant restrictions upon free speech. The Township's homeowners should be permitted to know the truth, and it cannot be presumed that they are incapable of rational responses if all relevant information is known to them. Furthermore, avoidance of the Township's perceived problem will not be realized by prohibiting "For Sale" signs, since residents have ample alternative means to learn that other residents intend to move away from the Township.

III.

The Township's ban on "For Sale" signs is directed solely against the message conveyed by such signs. There are no alternatives to "For Sale" signs which are likely to accomplish as fair and honest a representation of the property being offered for sale. "For Sale" signs do not require the obtaining and reading of newspaper advertisements, which may not always be objective. They do not require dealing with third parties who may have an interest in selling homes. No off-premises advertising can convey as effectively as a "For Sale" sign the relationship between a particular home and the area in which it is located. The sign ban cannot be justified as a mere incidental restriction on free speech since the Township's action was directed expressly toward preventing communication.

IV.

The District Court, amply supported by the record, found:

> [I]t appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. . . . [Petition for Certiorari, App. B at 4].

An ordinance having such a purpose violates the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT.

I. The Willingboro Ordinance Banning "For Sale" Signs Violates Petitioners' Right of Free Speech Under the First and Fourteenth Amendments.

A. Commercial Advertising Is Protected by the First and Fourteenth Amendments.[1]

This Court's decision and opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, – U. S. – , 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976), laid to rest the notion that protection under the First Amendment does not extend to "purely commercial advertising." *Cf. Valentine v. Chrestensen,* 316 U. S. 52 (1942). In so holding, this Court noted that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." (– U. S. at – , 48 L. Ed. 2d at 359, 96 S. Ct. at –). That society as a whole has a strong interest in free commercial advertising was also recognized:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [– U. S. at –, 48 L. Ed. 2d at 360, 96 S. Ct. at –].

1. The Fourteenth Amendment's Due Process Clause forbids state action which would offend the First Amendment if taken by the federal Government. *E.g., Thornhill v. Alabama,* 310 U. S. 88, 95 (1940). The same standards apply under both Amendments. *Malloy v. Hogan,* 378 U. S. 1, 10 (1964).

Commentators have noted a further consideration supporting this Court's decision:

> "[C]ommercial speech may be a vehicle for both personal and 'lifestyle' expression, and for persuation, and hence have value analogous to that of literary fiction." *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 1, 145 n. 23 (1976).

The present case supports this Court's decision not to deprive commercial speech of First Amendment protection. A person's choices of where he will live and what kind of home he will inhabit represent intensely personal concerns as well as practical concerns. Persons considering purchasing homes, and homeowners considering whether to remain in their homes, can make their decisions intelligently only if they have access to all relevant information. Advertising regarding the sale of homes plainly provides information which is relevant, if not crucial, to decisions such as these.

Furthermore, a homeowner who wishes to sell his home has an undisputed interest in communicating to the general public the fact that his home is for sale. The very fact that Willingboro has sought to forbid "For Sale" signs, and the reasons proffered by the Township to justify its sign ban, are testimony to the fact that such signs are an effective means of conveying that message.

Even those people who are not active participants in the real estate market have an interest in the information conveyed by "For Sale" signs. This Court noted in the *Virginia State Board of Pharmacy* decision:

> [If the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. [— U. S. at — , 48 L. Ed. 2d at 360].

The use and ownership of real estate within a community are matters of concern to members of that community whether or not each member may be involved actively in the local real estate market. The free flow of information about which properties are for sale in a community may be of great importance in insuring that public decisions with regard to the proper regulation of land use are made intelligently. *See generally Bigelow v. Virginia,* 421 U. S. 809, 821-822 (1975).

Petitioners take it to be established, therefore, that commercial advertising—including the use of "For Sale" signs—is entitled to protection under the First Amendment. For reasons expressed hereinafter, the "For Sale" sign ban adopted by Willingboro is an impermissible infringement upon protected communication.

B. A Ban on Advertising Cannot Be Justified if the Goal Sought to Be Accomplished Depends Upon Public Ignorance.

The purpose of the Willingboro Township Council in banning "For Sale" signs has been variously described during litigation of this case, but in this Court the Township has sought to justify the ban as an attempt to avoid "fear psychology" which "might result in Willingboro metamorphosing from an integrated community to a ghetto." (Brief in Opposition to Petition for Certiorari, at 8-9). Differently expressed, the Township Council

asserts that if homeowners see numerous "For Sale" signs, they will conclude that numerous homes are for sale and may rush to sell their own homes and affect the racial composition of the Township in ways that the Township considers detrimental.

Implicit within the Township's argument are assumptions that:

1. Seeking to maintain a predominately-white community is a legitimate goal.

2. Homeowners seeing "For Sale" signs will assume (a) that white homeowners are selling their homes and (b) that non-white persons will buy the homes.

3. Such persons will experience a "fear psychology."

4. Such persons will rush to sell their own homes.

5. This "fear psychology" and rush to sell are irrational.

6. Non-white persons will purchase most or many of homes thus offered for sale.

None of these assumptions have been demonstrated to be true. Furthermore, even if the assumptions were true, there is no reason to believe that the ban on "For Sale" signs would prevent the evil sought to be prevented. Even if the assumptions were true and the sign ban might reasonably prevent "fear psychology," however, the "For Sale" sign ban is nevertheless unlawful under the First Amendment because its goal depends upon public ignorance.

The desired effect of the sign ban is to prevent "fear psychology" by limiting public knowledge that homes are

for sale. All of the stated goals of the sign ban depend upon ignorance on the part of the public. A similar proffered justification for a drug-price advertising ban was considered and rejected by the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra:*

> The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. . . .
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. [Citation omitted]. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. We so hold. [— U. S. at —, —, 48 L. Ed. 2d 362, 363].

In this case, as well, the Township argues that its goal is to avoid "irrational reaction" by homeowners (Brief in Opposition to Petition for Certiorari, at 8). That may or may not be true. In the American constitutional system, however, it is not for the government to determine for its citizens whether a conclusion to be drawn from certain facts is correct or not. If the Township Council believes the reaction to be irrational, its sole constitutional remedy is to educate its citizens and convince them that their "fear psychology" is unfounded.

A homeowner commits no wrong by selling his home. If a homeowner dislikes his neighborhood or his neighbors, for reasons bigoted or otherwise, he is free to sell his home and move elsewhere. If the fact that many homes are offered for sale is an indication of neighborhood deterioration, a decision to sell might be rational rather than irrational. The Township's approach to the perceived problem, however, has not been to confront the problem maturely and openly. Rather the Township has sought to hide the problem by seeking to deprive homeowners of knowledge that homes are for sale. Under the authority cited, the sign ban cannot prevail over the First Amendment, since its goals depend upon public ignorance.

C. The Justification Offered by the Township Does Not Warrant the Invasion of Free Speech Occasioned by the "For Sale" Sign Ban.

Petitioners concede that protection of speech under the First Amendment is "not absolutely unlimited." *Near*

v. Minnesota, 283 U. S. 697, 716 (1931). Where communication is sought to be banned by government action, however, this Court has accepted that the government action is "presumptively unconstitutional." *Nebraska Press Association v. Stuart,* – U. S. – , 49 L. Ed. 2d 683, 697, 96 S. Ct. 2791 (1976), *quoting Pittsburgh Press Company v. Human Relations Commission,* 413 U. S. 376, 396 (1973) (Burger, C. J., dissenting). The burden upon the government is a "heavy burden of showing justification for the prior restraint." *Id.*

As expressed by Justice Brennan in his opinion in *Elrod v. Burns,* – U. S. – , – , 49 L. Ed. 2d 547, 559, 96 S. Ct. 2673, 2684 (1976):

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . Thus encroachment "cannot be justified by a mere showing of some legitimate governmental interest." *Kusper v. Pontikes,* 414 U. S. 51, 58, 38 L. Ed. 2d 260, 94 S. Ct. 303 (1973). The interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest.

In the present case, the Township has not met its heavy burden.

Where the government attempts to prevent communication of a certain message, the Court's obligation is to determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States,* 183 F. 2d 201, 212 (2d Cir. 1950), *aff'd,* 341 U. S. 494 (1951) (L. Hand, J.).[2] Here the "For Sale" sign ban fails the test:

2. This is thought to be a conservative test:
Cases like Brandenburg v. Ohio, 395 U. S. 444 (1969), appear implicitly to reject the open-ended, indeterminate Hand approach . . . in favor of a more narrow definition of the types of speech that may be suppressed or punished, and to adopt the clear and present danger test's requirement that freedom of speech can be overridden only where the danger to be averted is imminent and highly probable.
The Supreme Court, 1975 Term, 90 HARV. L. REV. 1, 161 n. 11 (1976). To the extent that any test focuses upon imminency and high probability of the perceived danger, such test favors Petitioners' argument herein.

1. There is no demonstrated "evil."

2. The "For Sale" sign ban is not "necessary."

3. The "For Sale" sign ban will not "avoid the danger."

1. The Township Has Not Demonstrated That an "Evil" Exists.

Before analyzing the Township's attempted justification of its "For Sale" sign ban, it might be appropriate to eliminate expressly the factors which are *not* involved in the case. *See Cohen v. California,* 403 U. S. 15 (1971).

This case does not involve a zoning ordinance sought to be justified on grounds of aesthetics. *Cf. Young v. American Mini Theatres, Inc.,* – U. S. – , – , 49 L. Ed. 2d 310, 327-334, 96 S. Ct. – , – (1976) (Powell, J., concurring). It does not involve false or deceptive advertising or communication which infringes upon the privacy of others.

A "For Sale" sign does not propose or encourage activities which are illegal. Thus a "For Sale" sign is similar to the abortion advertisement at issue in *Bigelow v. Virginia,* 421 U. S. 809 (1975), and is distinguishable from the sex-designated help-wanted advertisements considered in *Pittsburgh Press Company v. Human Relations Commission,* 413 U. S. 376 (1973).

Moreover, this case does not involve any actual evidence of panic sales or declines in property values. The District Court found:

> Yet in Willingboro, there exists no evidence of similar patterns ["whites disappear[ing] from the city *en masse*"]. Rather, there is merely an indication that its residents are concerned that there may be a large influx of minority groups moving into the town with the resultant effect being a reduction in property values. [Petition for Certiorari, App. B at 4].[3]

As articulated in its brief opposing certiorari, the Township's attempted justification for its "For Sale" sign ban is the following:

> Although Willingboro was and had been fully integrated, Township Council concluded that the fear psychology might result in Willingboro metamorphosing from an integrated community to a ghetto. [Brief in Opposition to Petition for Certiorari, at 8].

Thus the ultimate "evil" feared by the Township Council was that the Township might lose its predominately-white racial composition—that there might be an increase in the non-white percentage of the Township's population. A secondary "evil" was "fear psychology." Neither consideration represents a legitimate "evil" of sufficient gravity to allow suppression of free communication.

Petitioners are aware of no authority recognizing as legitimate a municipality's efforts to exclude or to limit the

3. No reduction in property values was shown. To the contrary, at trial a member of the Willingboro Township Council testified: "Right now, and over the last few years, we have experienced an increase in property values." (Petition for Certiorari, App. A at 41). A councilman also testified: "The number of turnovers was not out of line with national averages . . ." (U. S. C. A. Jt. App. 201a).

influx of non-white racial groups. Indeed, as Petitioners argue hereinafter in Part II of this Argument, any effort to exclude non-white residents or to adopt a quota for non-white residents would violate the Fourteenth Amendment's guarantee of Equal protection. Petitioners take it to be beyond dispute that a municipality may not justify a restraint on activity protected by the First Amendment by asserting a purpose which would violate the Fourteenth Amendment.

Furthermore, the Township has not demonstrated that "For Sale" signs cause the secondary "evil"—the alleged "fear psychology." The "fear psychology," it is alleged, arises when homeowners obtain knowledge that other homeowners are selling their homes. Yet such knowledge might be obtained in many ways—through "For Sale" signs; by word-of-mouth; through newspaper advertisements; through other advertising media. Homeowners surely will see moving vans and other evidence that townspeople are moving from their homes. A concerned homeowner certainly will be aware of new neighbors as they come and go in their daily activities.

Petitioners concede that "For Sale" signs are an effective way to communicate the fact that homes are for sale. Yet if citizens of Willingboro have been brought to such an emotional state that they would be expected to react irrationally to knowledge that others' homes are for sale, it would be expected that they would be actively seeking out information regarding the housing market. They would be talking to neighbors, reading newspaper advertising, and calling on real estate brokers. They would be sensitive to moving vans and to new faces among their neighbors. The Township has shown no rational basis for concluding that "For Sale" signs are the cause of "fear psychology."

When a Township seeks to justify a restraint upon free speech by citing an "evil" which it seeks to avoid, the Township ought to expect that its alleged "evil" will be considered closely, perhaps skeptically, from all vantage points. In *Erznoznik v. City of Jacksonville*, 422 U. S. 205 (1975), this Court considered an ordinance banning the showing of motion pictures containing nudity where such motion pictures would be visible from public places. Various argument were put forth to justify the ordinance: that it protected the privacy of unwilling viewers, that it protected children, that it aided regulation of traffic. Each of the arguments, upon analysis, was lacking in substance: The unwilling viewer could simply avert his eyes; the ordinance was overbroad if meant to protect children; it was underinclusive if meant to regulate traffic. Here, as well, the proffered justification cannot survive analysis. The perceived evil rises no further than did the "undifferentiated fear or apprehension" determined to be insufficient to warrant a restriction upon free speech in *Tinker v. Des Moines Independent Community School District*, 393 U. S. 503, 508 (1969).

Upon analysis, the "evil" cited in this case is no evil at all. The justification proffered by the Township cannot be accepted.

2. The "For Sale" Sign Ban Has Not Been Demonstrated to Be Necessary to Avoid "Fear Psychology" and Irrational Reaction.

"Fear psychology" is contended by the Township to be "an irrational reaction." (Brief in Opposition to Petition for Certiorari, at 8). For the Township to contend otherwise would doom its argument, since it could hardly justify an attempt to prevent its citizens from learning the truth if its only concern was that they would react rationally upon learning the truth.

"Irrational reaction," in the Township's argument, seems to be a homeowner's desire to sell his home and move away from his neighborhood. If avoidance of that "evil" is the Township's goal, the Township has failed to demonstrate that infringement upon free speech rights is necessary to avoid the "evil."

This point was considered in the Court's opinion in *Virginia State Board of Pharmacy, supra.* There, as here, an infringement upon free speech rights was sought to be justified by a contention that citizens would be best served "if they are not permitted to know" the truth. This Court there pointed out:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. [– U. S. at – , 48 L. Ed. at 363].

Thus under the constitutional system existing in the United States, communication and education are always an alternative remedy for irrational behavior. When a choice must be made between censorship and education as a remedy for irrational reaction, the Constitution dictates that education be the alternative remedy adopted.

Unless the Township is prepared to contend that its citizens are incapable of rational responses, a contention which the record will not support, the Township cannot contend that there exists no alternative to the "For Sale" sign ban. Since an alternative exists, it cannot be said that the sign ban is necessary to avoid any perceived "evil."

3. There Has Been No Demonstration That the "For Sale" Sign Ban Will Prevent "Fear Psychology" and Irrational Reaction.

In assessing whether governmental action infringing upon free speech is lawful notwithstanding the First Amendment, the Court must consider whether the action is likely to avoid the perceived "evil." *Nebraska Press Association v. Stuart, supra.* Where the government cannot demonstrate that its action will be effective, its action must be held unlawful even if the "evil" is real and alternative remedies do not exist.

Here there has been no demonstration that "fear psychology" will be avoided by banning "For Sale" signs. As discussed above, homeowners obtain information regarding the state of the housing market from many sources—word-of-mouth, formal advertising, and simply watching the events that occur around them. If homeowners are so prone to panic that "For Sale" signs might cause "fear psychology," it would be expected that they would be sensitive to other indications—both formal and informal—that homes are for sale. If, therefore, "fear psychology" is a real possibility, banning "For Sale" signs would be unlikely to prevent the "evil."

When significant First Amendment rights are to be suppressed, the government should be prepared to demonstrate that its proposed action will actually achieve some significant goal. Here no such demonstration has been made.

4. The Decision in *Nebraska Press Association v. Stuart* Supports Reaching the Same Result Here.

In *Nebraska Press Association v. Stuart*, — U. S. — , 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976), the Court considered the lawfulness of a court's pretrial order restraining publication of certain facts concerning a homicide. Without dissent, the Court held the order to be unlawful.

The Chief Justice, writing for the Court, recognized that the lower court had "acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial." (— U. S. at — , 49 L. Ed. 2d at 695, 96 S. Ct. at —). Nevertheless the lower court order was held unlawful as violative of the First and Fourteenth Amendments, since:

> [O]n the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require. [— U. S. at — , 49 L. Ed. 2d at 703, 96 S. Ct. at —].

The same considerations exist here. Even if the Township acted legitimately in attempting to avoid "fear psychology" and stabilize its racial composition:

> 1. The record will not support a finding that continued use of "For Sale" signs would have led to "fear psychology" and panic selling by white homeowners.

2. The record will not support a finding that alternatives to an absolute ban on "For Sale" signs would not have alleviated the problems.

3. It cannot be concluded that the ban on "For Sale" signs would serve its intended purpose.

The considerations regarded as significant in the *Nebraska Press Association* opinion weigh in the same direction here. That decision is firm authority for the same result here.

D. The Sign Ban Cannot Be Justified as a Mere Restriction Upon the Time, Place, or Manner of Communication.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* this Court noted as a caveat to its decision:

> We have often approved restrictions of that kind ["time, place, and manner" restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. [– U. S. at –, 48 L. Ed. 2d at 363-364, 96 S. Ct. at –].

As expressed in *Buckley v. Valeo,* 424 U. S. 1, 12 (1976):

> The government may adopt reasonable time, place, and manner regulations, which do not discriminate between speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication.

The "For Sale" sign ban at issue herein cannot be justified under any such theory.

First, the sign ban cannot be justified without reference to the content of the sign. The Township's proffered justification for the sign ban focuses upon the message itself rather than upon the sign, and the Township's purpose will be realized only if the message is suppressed.

Second, the "For Sale" sign ban serves no legitimate governmental interest. To keep the public in ignorance, as shown above, is not a legitimate governmental interest even if the government fears that the public may react irrationally to the facts sought to be kept hidden. Nor is the maintenance of a predominately-white racial balance a legitimate governmental purpose.

Third, the sign ban does not leave open ample alternative channels of communication. The Township's purpose, in fact, will be realized only if free communication is significantly curtailed. Petitioner Mellman testified at trial that thirty percent of his inquiries were the result of sign placement. The District Court found that without the use of "For Sale" signs "one who wishes to purchase a home in Willingboro has no way of learning what is available." (Petition for Certiorari, App. B at 5). Moreover, there are numerous citizens of Willingboro who may not be in the market to purchase homes but who nevertheless are vitally interested in the market for homes. These persons may have no ready means to learn of market conditions except through their awareness of "For Sale" signs.

In this regard, the unique effectiveness of on-premises "For Sale" signs should be considered. When a "For Sale" sign is used to sell residential premises, the sign, the home, and the grounds convey the "message" as completely and honestly as any advertising is likely to accomplish. The on-premises sign enables the prospective purchaser to see the home together with its neighborhood, the nearby schools and shopping centers, and all other

aspects of the immediate surroundings. No newspaper advertisement can be as effective or as candid.

Furthermore, residential "For Sale" signs are relatively inexpensive and can be erected without difficulty at any time. Newspaper advertising involves time and expense. Brokerage listings involve a contract.

"For Sale" signs are useful, too, in informing members of the general public who might not be actively involved in the real estate market. All passers-by may view a "For Sale" sign, whereas few citizens not considering buying or selling homes would be expected to pore through newspaper advertisements or consult real estate brokers. This Court recognized in *Cox Broadcasting Corporation v. Cohn*, 420 U. S. 469, 491 (1975), that in our society "each individual has but limited time and resources with which to observe at first hand the operation of his government . . . ." The same is true of other concerns as well. Forbidding "For Sale" signs would force the individual citizen to spend an inordinate quantity of time and resources to gain the same information.

For many reasons, then, "For Sale" signs are uniquely effective in conveying the message they contain.

As expressed in *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972), in discussing regulation of speech as to time, manner, and place:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. [Footnote omitted].

Here there is no contention that placement of a simple "For Sale" sign on residential premises is incompatible

with the normal use of the residential premises and neighborhood. The complete ban on "For Sale" signs cannot be considered a proper "time, manner, or place" regulation. In no way are "For Sale" signs analogous to the "loud and raucous" sound trucks considered in *Kovacs v. Cooper*, 336 U. S. 77 (1949); the "noise or diversion" interfering with school activities considered in *Grayned v. City of Rockford, supra;* the "street meeting in the middle of Times Square at the rush hour" mentioned hypothetically in *Cox v. Louisiana*, 379 U. S. 536, 554 (1965); or the face-to-face interviews between newsmen and prison inmates considered in *Pell v. Procunier*, 417 U. S. 817 (1974).

E. The "For Sale" Sign Ban Cannot Be Justified as a Mere Incidental Restriction of Free Speech.

Where governmental action is not directed at preventing communication and has only incidental or minimal impact upon free speech, the action will be upheld

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U. S. 367, 377 (1968); *Young v. American Mini Theatres, Inc.*, — U. S. —, 49 L. Ed. 2d 310, 331 (1976) (Powell, J., dissenting).

In this case, it cannot be said that the Township's purpose is within its constitutional power. Fostering a predominately-white racial composition is not a constitutional governmental goal. Nor is it constitutional to

seek goals in ways which depend upon public ignorance. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra.*

Banning "For Sale" signs, as is argued more fully above, is not calculated to further the alleged governmental interest. "For Sale" signs have not been demonstrated to cause "fear psychology" nor will their prohibition prevent "fear psychology," since citizens have other means of learning the truth and will be expected to do so if, indeed, they are prone to "fear psychology."

It cannot be said that the Township's "interest is unrelated to the suppression of free expression," as the *O'Brien* test demands. This case is analogous to that presented in *Buckley v. Valeo,* 424 U. S. 1 (1976), where the Court considered provisions of the Federal Election Campaign Act of 1971, as amended in 1974. There, as here, the governmental purpose involved "suppressing communication" and was based upon a perception that the communication was "itself thought to be harmful." *Id.,* 424 U. S. at –, 46 L. Ed. 2d at 686, 687, *quoting United States v. O'Brien, supra,* 391 U. S. at 382. This case is likewise analogous to *Elrod v. Burns,* – U. S. –, 49 L. Ed. 2d 547 (1976), where, for the same reasons, the court refused to apply the *O'Brien* test to a patronage hiring system (– U. S. at – n.17, 49 L. Ed. 2d at 560 n.17).

This portion of the *O'Brien* test was illustrated in Ely, *Flag Desecration: A Case Study in the Roles of Categorization And Balancing In First Amendment Analysis,* 88 HARV. L. REV. 1482, 1497 (1975), as follows:

> If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is (as in such cases it will likely have to be) that the danger was created by what the defendant was saying, the state's interest is not unrelated to the suppression of free expression within the meaning of *O'Brien's* criterion [2].

Plainly the present case falls within the Ely example of where the *O'Brien* test is inapplicable. *See also Cohen v. California,* 403 U. S. 15 (1971).

Nor can it be said that the restriction is no greater than the minimum amount essential to accomplish the goal of eliminating "fear psychology." As shown above, education exists as an alternative remedy to combat irrational reaction.

The Township's case is not aided by the decision in *Young v. American Mini Theatres, Inc.,* – U. S. –, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). In that case a divided majority of the Court upheld a zoning ordinance designed to prevent concentration of "adult" threaters and certain other establishments. The members of the Court constituting the majority noted the following facts in support of their decision:

> 1. The ordinance did not limit the number of adult theaters which might operate within the municipality. (– U. S. at –, 49 L. Ed. 2d at 321, 96 S. Ct. at – (Opinion of the Court)).
>
> 2. The availability of adult films was essentially unrestrained by the ordinance. (– U. S. at –, 49 L. Ed. 2d at 321, 330, 96 S. Ct. at –, – (Opinion of the Court and Concurring Opinion of Justice Powell)).
>
> 3. The regulation was "unaffected by whatever social, political, or philosophical message the film may be intended to communicate." (– U. S. at –, 49 L. Ed. 2d at 326, 96 S. Ct. at – (Opinion of Justice Stevens for four members of the Court)).

4. The affected communication was not one "in which the content or effectiveness of the message depend[ed] in some measure upon where or how it was conveyed." (— U. S. at n.2, 49 L. Ed. 2d at 331 n.2, 96 S. Ct. at — n.2 (Concurring Opinion of Justice Powell)).

5. The "governmental interest prompting the inclusion in the ordinance was wholly unrelated to any suppression of free expression." (— U. S. at —, 49 L. Ed. 2d at 332, 96 S. Ct. at — (Concurring Opinion of Justice Powell)).

None of these factors exist here. This ordinance not only limits the number, but absolutely forbids the use of "For Sale" signs within Willingboro. The record demonstrates that a homeowner's ability to publicize his wish to sell his home, as well as the availability of information regarding the housing market, are severely diminished by the ordinance. The record likewise demonstrates that the expressed purpose in adopting the ordinance was to suppress the communication of a certain "message"—that homes are for sale. The record demonstrates, and the ordinance in fact assumes, that the effectiveness of that "message" will be diminished if "For Sale" signs cannot be used to communicate it. The governmental interest in enacting the sign ban was not unrelated to suppression of free expression but in fact depended upon its suppression.

Moreover, the disposition of this case would not be governed by the holding in *Young* even if this Court should adopt the holding which would have been reached by four members of the Court in that case—that "a line may be drawn on the basis of content without violating the Government's paramount obligation of neutrality in its regulation of protected communication." (— U. S. at —, 49 L.

Ed. 2d at 326, 96 S. Ct. at —). This case does not involve incitement to crime or violence, or fighting words, or information concerning national security, or false or deceptive statements, or profanity, or obscenity, or any form of erotic materials. This case involves the communication, and the attempted censorship, of a pure message which is neither unlawful, deceptive, nor offensive: the fact that a home is being offered for sale. The ordinance has no impact other than on free communication, and all of its goals depend upon suppression of communication. The *Young* result is no authority for upholding the ordinance in question here.

II. The Ordinance Banning "For Sale" Signs Violates the Fourteenth Amendment's Equal Protection Clause.

The District Court found:

> [I]t appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines.
>
> There can be no doubt that this is precisely the result desired by the Willingboro Town Council in adopting this ordinance. . . . [Petition for Certiorari, App. B at 4].

In this Court the Township acknowledges that its ultimate goal in adopting the "For Sale" sign ban was to prevent the Township from "metamorphosing from an integrated community to a ghetto." (Brief in Opposition to Petition for Certiorari, at 9).

The District Court found further:

> Even more important is the concomitant result: one who wishes to purchase a home in Willingboro has no way of learning what is available. He only

has the "option" of choosing a home from those which he is shown by a realtor, thereby necessitating the use of a real estate brokerage firm. Further, the broker or salesman may be very selective in choosing which home he wishes to show a potential buyer. This fact along with the purported "purpose of the ordinance—'stabilization of neighborhoods'—may have the ultimate effect of freezing in past discrimination, denying blacks a fair opportunity to find suitable housing." *DeKalb Real Estate Board* [*v. Chairman and Board of Commissioners of Roads and Revenue for DeKalb County,* 378 F. Supp. 748 (N. D. Ga. 1973)].

Thus, this circumstance leads to the natural conclusion that in its application the Willingboro ordinance results in an infringement upon the fundamental right to travel [citation omitted], a right which may not be abridged absent a compelling State interest. [Petition for Certiorari, App. B at 5].

Dissenting in the Court of Appeals, Circuit Judge Gibbons expanded upon this point:

> The intended purpose of the ordinance is to discriminate against racial minorities by "stabilizing" the non-white population of Willingboro at not more than 20 percent. This is not affirmative action to overcome the effects of past discrimination, but is invidious discrimination of the most pernicious sort, against a discrete and insular minority seeking fulfillment of the American Dream of owning a home in the suburbs. [Petition for Certiorari, App. A at 46-47].

Thus the motive of the Township in adopting the ordinance was to prevent a significant increase in the non-white percentage of the Township's population. The

effect of the ordinance was to interfere significantly with prospective purchasers' access to homes actually available for sale. Under prior decisions of the Court, the ordinance's discriminatory purpose and effect violated the Fourteenth Amendment's equal protection clause. *E.g., Gilmore v. City of Montgomery,* 417 U. S. 556 (1974); *Reitman v. Mulkey,* 387 U. S. 369 (1967); *Griffin v. County School Board of Prince Edward County,* 377 U. S. 218 (1964); *Gomillian v. Lightfoot,* 364 U. S. 339 (1960) (Whittaker, J., concurring).

As stated above, the Township concedes that its purpose in adopting the ordinance was to limit its percentage of non-white residents. The record supports such a concession. The Township's Exhibit D-1 showed the following statistics regarding the Township's racial composition (Petition for Certiorari, App. A at 36; U. S. C. A. Joint Appendix at 128a):

WILLINGBORO TOWNSHIP

Year	*Total Popul.*	*White Popul.*	*Black Popul.*	*Other Popul.*	*Non-White Popul.*	*Percent Non-White*
1950	852	Unavail.	Unavail.	Unavail.	Unavail.	Unavail.
1960	11,861	11,801	6	54	60	.005
1970	43,414	38,326	4,738	350	5,088	.117
1973	44,607	36,485	7,637	485	8,122	.182

The Township's witness, council member and former Mayor William J. Kearns, Jr., testified on direct examination:

> Q. Were you, prior to the winter of '73-'74, able to obtain a feeling on the community sentiment with respect to for sale signs in the township?
>
> A. I believe so, yes.
>
> Q. And what was that opinion at that time?

A. I think there was very definitely a feeling in the community that something should be done to prohibit real estate signs in the community.

. . .

. . . I discussed it with a number of people, and I think that the concern that was generally expressed was that people in the community were expressing a desire to sell their homes and move to other areas of Burlington County because what they sensed was a lack of stability or a large turnover in the community, and that this large turnover was resulting in a substantial influx of minority groups into the community beyond what could be sustained without the community itself turning into a ghetto within the county.

. . .

I don't think anyone was concerned with people of minority groups moving into the community or reaching a 20 percent, or even somewhere in the range of 20 to 25 percent minority grouping. They felt this was properly a generally average throughout the Delaware Valley area.

But they did feel that if we had a situation where white home owners in the community were moving, not because they were transferred or not to move to a larger home or a smaller home, for other economic reasons, but were moving because what they sensed was the reaction of the community, but that we would wind up with Willingboro hitting beyond the point of minority group population that would turn it into an isolated pocket of minority groups in Burlington County. It would no longer reflect an integrated community, but would become a ghetto. [U. S. C. A. Joint Appendix at 179a-182a].

This evidence, along with substantial other evidence detailed carefully in the dissenting opinion of Judge Gibbons in the Court of Appeals (Petition for Certiorari, App. A at 35-46), shows clearly that the Township's purpose was to remain predominately-white. Under the authority cited above, the "For Sale" sign ban, reflecting that purpose, violated the Fourteenth Amendment's guarantee of equal protection.

CONCLUSION.

For the reasons stated, the judgment of the Court of Appeals should be reversed. The District Court's judgment, declaring unconstitutional the ordinance banning "For Sale" signs, should be reinstated.

Respectfully submitted,

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